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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71 - 604

ROBERT ANTHONY WHITE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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To THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming the judgment of the United States District Court for the Central District of California, convicting the petitioner for a violation of the Universal Military Training and Service Act and sentencing him.

1. OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals is not yet reported. It is set forth as Appendix A to this petition.

2. STATUTORY PROVISION SUSTAINING JURISDICTION

The judgment of the Court of Appeals was entered on September 14, 1971, and the denial of Petition for Rehearing was entered on October 5, 1971.

This Petition for a Writ of Certiorari is filed within the required thirty days' time.

The jurisdiction of the Court rests on Section 1254 (1) of the Judicial Code, 28 U.S.C. The District Court had jurisdiction under U.S.C. § 3231.

3. QUESTIONS PRESENTED AND HOW RAISED

The Motions for Judgment of Acquittal and the briefing in the Court of Appeals raised the following questions including the one of late crystallization of conscientious objections, considered by this Court in *Ehlert* v. *United States,* 402 U.S. 99, 91 S.Ct. 1319 (1971).

A. This petitioner questions the applicability of *Ehlert* to him and also validity of the explicitly stated *factual* basis given by this Court for *Ehlert.*

B. Whether *Mulloy* v. *United States,* 398 U.S. 410 (1970), requires a reopening of a registrant's classification postured as petitioner's.

C. Also, whether the recognition by the Department of Defense that its DoD 1300.6 should be amended to bring military practice to a state of consistency with this Court's prophetic *Ehlert* decision, *supra,* of April 21, 1971, gives protection to men, like this petitioner, who when they were administratively processed did not have a forum available.

D. Constitutional questions, applicable to men postured as this petitioner.

4. STATUTES AND REGULATIONS INVOLVED

Involved are the Fifth Amendment and 32 C.F.R. § 1625.2. They are set forth in *McIntyre,* see below.

5. STATEMENT OF THE CASE

The indictment charged White with a violation of the Universal Military Training and Service Act for refusing to submit to induction [CT 1].

Petitioner pleaded "not guilty" and was tried by the Honorable Irving Hill, District Judge, sitting alone without a jury. He was found guilty and given a probationary sentence [CT 26], and is on bail pending appeal.

A written Motion for Judgment of Acquittal had been filed during the trial [CT 21].

6. THE FACTS

The facts are found in the Selective Service file of the appellant.

He was sent an order on May 22, 1969 to report at the induction station on June 10, 1969 [Ex. 40].

Thereafter, on June 2, 1969 he asked for the conscientious objector form, explaining his delay and asking for reopening of his classification [Ex. 41].

He completed the conscientious objector form, right after it was handed to him [Ex. 42-].

The board wrote the appellant to come in to its office and meet the board on April 9, 1970 [Ex. 61].

The appellant came on the appointed day bringing with him a further statement of his beliefs [Ex. 62-], the invitation of the board having stated the meeting was "for the purpose of clarifying information in your Selective Service file" [Ex. 56].

At this April 9, 1970 meeting the discussion initiated by the board went into considerable detail concerning its registrant's religious training and his religious beliefs [Ex. 64].

He was eventually sent another letter giving a date when he was to appear for induction [Ex. 70]; he obeyed, but refused to submit to the induction ceremony [Ex. 87-].

7. REASONS FOR GRANTING WRIT

The Court should consider anew its *Ehlert* decision because it *now* is demonstrable that the explicit reason for the Court's conclusion was without sufficient *factual* basis, the Department of Defense having provided, in August, 1971, a forum for men such as this petitioner. White had no forum when he was ordered to report for induction.

The above is a repetition of the "Reasons Why . . ." portion of the petition for a writ of certiorari filed October 20, 1971 in *McIntyre* v. *United States*.

Counsel has endeavored, by a series of petitions culminating in this one of Robert White, to cumulate the factual basis for his point that the Court's explicit basis for its *Ehlert* holding, namely the assurance of the General Counsel of the Army [*Ehlert, supra,* p. .....] had no basis in fact; that the General Counsel of the Army had been misinformed.

The McIntyre petition added to the prior, related ones the August 20, 1971 amendment by the Department of Defense to its DoD 1300.6; that this amendment brought the military's practice in line with the "assurance" of the General Counsel of the Army and that this demonstrates that McIntyre (and White) had no forum when they refused to obey the Selective Service System order to submit to induction.

CONCLUSION

Petitioner adopts the argument heretofore made in *McIntyre* and believes certiorari should be granted and his conviction be summarily reversed.

Respectfully submitted,

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November 2, 1971

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ROBERT ANTHONY WHITE,
Defendant-Appellant.

No. 71-1670

(Filed September 14, 1971)

Appeal from the United States District Court for the Central District of California

Before: DUNIWAY, WRIGHT and CHOY, Circuit Judges.

WRIGHT, Circuit Judge:

White appeals from his conviction for refusing to submit to induction into the Armed Forces in violation of 50 U.S.C. App. §462. We affirm.

On May 28, 1968, appellant was mailed an Order to Report for Induction with a reporting date of June 19, 1968. He failed to appear for induction. On November 12, 1968, he denied having received the order to report. On January 22, 1969, appellant's local board ordered him to report for induction on February 5, 1969. Appellant again failed to appear.

On May 6, 1969, the board received a letter from appellant in which he said: "Please send me an order to report for induction. There has been a continual foul-up; on my mail, my relatives *and my own conduct, I must admit.*" (Emphasis added.) On May 22, 1969, the board again wrote appellant, reminding him of his continuing duty to report, and ordering him to report for induction on June

10, 1969. On June 2, 1969, appellant requested the "Conscientious Objector" form, Form 150. It was issued and completed the same day. Appellant reported on June 10, 1969 but refused induction.

On July 24, 1969, the United States Attorney declined to prosecute so that the board could consider appellant's conscientious objection claim. His letter stated: "If the Local Board, upon review, finds no facts warranting a reopening of registrant's classification, it is recommended that he be sent a continuing duty order for induction."

On September 25, 1969, the board voted to call appellant for an interview. On November 13, 1969, he was invited to appear before the board. After several postponements, he was interviewed on April 9, 1970. The board determined, correctly, that appellant had presented no information justifying a finding that there had been a change in circumstances over which appellant had no control. The board thus declined to reopen his classification under 32 CFR §1625.2.

On August 18, 1970, appellant was mailed a continuing duty letter ordering him to report for induction on September 1, 1970. He reported, refused to submit to induction, was indicted and convicted.

Appellant raises two contentions on appeal. First, he argues that his local board was required to reopen his classification after he filed his conscientious objection claim on June 2, 1969. In this contention he is clearly in error. When he submitted his conscientious objection claim he had already received and disobeyed an order to report for induction. He was under a continuing duty to report for induction. 32 CFR §1642.15.

Under *Ehlert* v. *United States*, 402 U.S. 99 (1971), the local board was not required to reopen his classification

after the order to report was mailed, and *a fortiori* was not required to do so after the order had been disobeyed. *See also United States* v. *Bloom,* (9th Cir. No. 71-1536, June 22, 1971); *United States* v. *Nix,* 437 F.2d 746 (9th Cir. 1971); *United States* v. *Hart,* 433 F.2d 950 (9th Cir. 1970); and *United States* v. *Blakely,* 424 F.2d 1043 (9th Cir. 1970). *Mulloy* v. *United States,* 398 U.S. 410 (1970), on which appellant relies, is clearly distinguishable. There the conscientious objection claim was filed before the mailing of the order to report for induction.

Appellant next argues that the United States Attorney's decision not to prosecute immediately and the decision of the local board to grant him an interview after his refusal to submit to induction on June 10, 1969, constituted a *de facto* reopening of his classification. Appellant urges upon us *Miller* v. *United States,* 388 F.2d 973 (9th Cir. 1967) and *Howze* v. *United States,* 409 F.2d 27 (9th Cir. 1969).

Miller, decided before *Ehlert,* is distinguishable. In *Miller,* the state director expressly authorized the local board to reopen the classification, which the United States Attorney had no power to do. Further, in the present case. the United States Attorney requested a review of the file, not a reopening of the classification. Finally, in *Miller,* the postponements of induction, the letter from the state director, and the review of the file all took place *before* the registrant disobeyed an order to report for induction. Under *Hart,* the local board is powerless to reopen a registrant's classification after the registrant had disobeyed an order to report for induction. Moreover, even if the board had had authority to reopen, appellant failed to show circumstances beyond his control. 32 CFR §1625.2.

Howze is also of little help to appellant. First, it is not clear whether Howze's claim was pressed before or

after an order to report for induction was mailed. Second, it appears Howze presented *prima facie* evidence of circumstances beyond his control. Finally, there is no suggestion that Howze had already disobeyed an order to report for induction before presenting his claim.

Although appellant does not raise the issue, we note that more than 120 days elapsed between the date on which appellant was first ordered to report (June 19, 1968) and the date on which he finally refused to submit to induction (September 1, 1970) resulting in his conviction. We distinguish *United States* v. *Munsen*, ... F.2d ..... (9th Cir. No. 71-1275, June 11, 1971); *United States* v. *Stevens*, 438 F.2d 628 (9th Cir. 1971), and *United States* v. *Lonidier*, 427 F.2d 30 (9th Cir. 1970), in which convictions were reversed because more than 120 days had elapsed between the original reporting date and the final reporting date. *See* 32 CFR §1632.2.

In all of those cases the registrant reported for induction. His induction was then officially held in abeyance pending investigation to determine his fitness for service (*i.e.*, for the benefit of the government). There were security investigations in *Stevens* and *Lonidier*, and investigation of a marijuana offense in *Munsen*. Those three cases hold that a registrant who has willingly reported and whose induction has been officially held in abeyance for the benefit of the government can complain of ensuing administrative delay. Delay in excess of 120 days effects a cancellation of the induction order.

Appellant, on the other hand, had willfully and repeatedly failed to appear for and submit to induction. There was no official holding in abeyance and no benefit to the government from the delay. Rather, the delay resulted from the government's giving appellant several chances to avoid criminal prosecution (by rescheduling his induction)

and giving consideration to appellant's very belated conscientious objection claim.

Unlike the registrants in the three cited cases whose inductions were officially held in abeyance, appellant was under the "continuing duty" (of one who has already disobeyed) to report for and submit to induction.[1] 32 CFR §§1642.2, 1642.15.

We hold that one who has willfully failed to appear for or refused to submit to induction when validly ordered to do so cannot thereafter complain of mere administrative delay.

Affirmed.

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1. Although in *Munsen* the registrant had once failed to report for induction, the record in that case clearly shows that he was given another chance and reported willingly on September 18, 1968. At this point his local board officially postponed his induction for the benefit of the government. Thus the administrative delay which led to reversal in *Munsen* occurred after Munsen had purged himself of his original failure to report.